

The “Case” for Rethinking European Courts’ Application of International Law.

1. Introduction.

Article 3(5) TEU

The European Union (EU) now has a new Treaty provision to guide international relations;

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and development of international law, including respect for the principles of the United Nations Charter.¹

It is necessary to cite the article in full in order to appreciate the remarkable breadth of aims contained therein. The more modern concepts of sustainable development and protection of human rights have certainly become well established centre-pieces of the internal EU legal structure. Some progress has undoubtedly been made at an international level in these areas also. However, recent instances have marked a dichotomy between EU values (and law) and their international counterparts. In the case of *Kadi*² the European Court of Justice (ECJ) annulled a Community Regulation which incorporated verbatim a Security Council Resolution. It proved a controversial decision or, at least, divided scholarly opinion and generated much comment. The ECJ has been criticised for ‘withdrawing into one’s own constitutional cocoon, isolating the international context’³ and simultaneously praised for creating ‘an incentive for the further development and improvement of international law’.⁴

¹ Consolidated Version of the Treaty on the European Union, Article 3(5).

² Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council [2008].

³ J Weiler, *Editorial: EJIL Vol. 19:5 (Kadi)*, *EjilTalk* 13/01/2009 <<http://www.ejiltalk.org/letters-to-the-editor-respond-to-ejil-editorials-vol-195/>>.

⁴ P Eeckhout, *Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC*, *EjilTalk*, 25/2/2009 <<http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>>.

Whatever form of reasoning one adopts to justify or criticise the decision, it is undeniable that the dichotomy between EU values and international provisions gave rise to the need for judgement. And this shall not change in the immediate future; meaning that the uneasy application of international law in the European Union may need to be reconsidered. Article 3(5) TEU appears to appreciate this friction and calls for a balance to be struck.

2. The Case.

The case of *Air Transport Association (and others) v Secretary of State for Energy and Climate Change*⁵, questioning whether Directive 2008/101 breaches international law, is currently referred from London to the European Court of Justice (ECJ) for a preliminary ruling. Directive 2008/101 incorporates international commercial airline emissions into the European emission trading scheme which has been operating since 2004.⁶ Becoming fully operational in January of 2012, it currently only imposes obligations on airlines to report emissions statistics.⁷ The Directive provides that ‘all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.’⁸ The obligation on aircraft operators to provide credits (measured in tonne-kilometers) for emissions shall be calculated by the formula ‘tonne-kilometres = distance x payload’, where distance ‘means the great circle distance between the aerodrome of departure and arrival plus an additional fixed factor of 95km’.⁹ It becomes immediately clear from the above text that the Directive applies irrespective of airline nationality, and that there appear to be extraterritorial effects. For example, in applying the formula for tonne-kilometres to a flight from New York to London one can see that emissions over the US and international waters are being covered in addition to those over the EU.

The Chicago Convention provides that:

⁵ 27/5/210 [2010] EWHC 1554(Admin).

⁶ Directive 2003/87/EC of the European Parliament And of the Council of 13 October 2003.

⁷ Even those airlines which are challenging the legislation in the English Courts are complying, see *ATA challenges the application of the EU ETS to U.S. Airlines*, Air Transport Association (accessed 20/6/2010) <http://www.airlines.org/PublicPolicy/Judicial/Pages/filings_12-16-09.aspx>

⁸ Directive 2008/101/EC, Annex 1(b).

⁹ Ibid Annex 2(B).

The contracting States recognize that every State has complete and exclusive jurisdiction over the airspace above its territory.¹⁰

The Directive appears irresolvable with the above provision and what could arguably be a fundamental principle of customary international law; the sovereignty of a state over its own territory. Coincidentally airspace over international waters has been expressly reserved for the ICAO itself¹¹, meaning that collectively the Member States of the EU may only regulate within their collective jurisdiction.

An alternative characterisation, desired by environmental organisations in the referral, of Directive 2008/101 would be that rather than attempting to govern emissions within other States' jurisdictions, the obligation to (conceptually) proffer allowances is a prerequisite for entry to EU airspace and unconnected with geography.¹² Article 15, however, provides that:

No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

The EU Directive, being unconnected with airport usage itself, is destined to breach this particular Article by becoming a charge connected only with transit.

It seems true then that substantive analysis and strict application would likely reach the conclusion of illegality. But the case of *Intertanko*¹³ recently displayed the difficulties in relying on international Treaty provisions when moving for invalidation of EU legislation. In that case the EU were party to one of the relevant Conventions, here that is not the case. However, Article 1 of the Chicago Convention is very likely

¹⁰ The Chicago Convention, Article 1.

¹¹ Ibid Article 12.

¹² N 5 above, paragraph 82.

¹³ Case C-308/06 *Intertanko and others v Secretary of State for Transport* [2008].

to have crystallised (or already been in 1944¹⁴) customary international law, and is thus binding on the EU without the need for it to be party to the Convention.¹⁵

Treaty law at the European Level

The EU is not a party to the Chicago Convention, although all of its Member States are.¹⁶ This means that, unlike an agreement concluded by the EU, the Convention is not binding on all EU institutions. The Convention is of a date prior to 1 January 1958 and as such the transitional provision is applicable:

To the extent that such agreements are not compatible with the Treaties, the Member State or States shall take all appropriate steps to eliminate the incompatibilities established...¹⁷

This requires Member States to renegotiate, and ‘all appropriate steps’ ultimately requires, in lieu of successful renegotiation, Member States to denounce such agreements where international law permits.¹⁸ This requirement has already taken effect in the field of separate international bilateral airline agreements in several cases; all of which ultimately required renegotiation with the US, although in those cases the agreements were held to have been concluded after accession.¹⁹ The case of *Commission v Portugal*²⁰ showed this renegotiation to be an obligation of ends rather than means, and it has been observed that the ‘margin of action left to the states is thus very narrow’.²¹ Clearly it is broadly undesirable for the EU to either pass, or for the ECJ to frequently uphold, legislation which places Member States in such an

¹⁴ Although prior to the advent of ‘flight’ the French asserted jurisdiction only up to the top of the Eiffel Tower, any higher being unnecessary.

¹⁵ Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992], paragraphs 9-10.

¹⁶ Directive 2008/101 Recital (9).

¹⁷ Article 351 TFEU, second paragraph.

¹⁸ Case C-170/98 *Commission v Belgium* [1999], paragraph 42.

¹⁹ Commission action against eight Member States, by way of background and post-case update see: *EU Commission Takes Action to Enforce “Open Skies” Court Rulings*, European Commission, (20/1/2004) <<http://www.eurunion.org/news/press/2004/200400116.htm>>.

²⁰ C-84/98 *Commission v Portugal* [2000].

²¹ Ličková, *European Exceptionalism in International Law*, EJIL 2008 19 (463), p 365.

undesirable position. To this end it is interesting to note the EU declaration of reservation to the ICAO in which it claims that Directive 2008/101 is compliant with the Chicago Convention. The sentiment being that the Convention, to the EU's mind, need not be renegotiated. Whilst such a statement could not bind the ECJ it would also be unimaginable for the Court to require Member States to renegotiate or even denounce the Chicago Convention on both political and practical levels as it is a remarkably important multi-lateral Treaty, unlike in the case law above.²² The case law equally has never suggested that the EU should review its legislation where renegotiation is not possible, leaving us on somewhat uncertain ground in this case.

The Chicago Convention's continued presence seemingly assured, it becomes necessary to analyse what impact the Convention can have on EU law. The "open-skies" cases suggest that the EU has not acquired all competences which the Member States possessed in the field of air transport.²³ 'In the absence of a full transfer of the powers previously exercised by the Member States'²⁴ the Community cannot be bound by Conventions which only Member States are party to, that is so regardless of the fact that all Member States are party to the Chicago Convention. The ECJ expressly stated that such a Convention cannot call into question the validity of a Directive, however:

In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of [the Convention].²⁵

This, rather vague, statement proved to be the end of the analysis on this matter within the *Intertanko* judgement. How this 'interpretation' should be given effect was not discussed, and the possibility of irresolvable differences seemingly not contemplated. Moreover, of relevance for the current referral, the case law suggests that where the EU is not party to a Member State agreement and is providing a preliminary ruling it is for the national Court, and not the ECJ, to interpret the extent of international

²² P Eeckhout *External Relations of the European Union*, (OUP, 2005), p 342.

²³ Ibid, p336.

²⁴ *Intertanko* (N 13 above) paragraph 49.

²⁵ Ibid paragraph 52.

obligations.²⁶ In this regard the Chicago Convention does broadly appear largely unequivocal and precise as to the extent of party obligations. However, given the reluctance shown by the ECJ to engage in any such analysis in *Intertanko*, where it was well placed to do so, such guidance in the present case appears markedly unlikely. The concluding discourse appears to be one of, at best, (extremely) muted interpretation in light of international law and, at worst, mere lip-service to international obligations. Where the ECJ does not undertake this interpretation it is noted that, upon return, domestic courts are faced with the Supremacy of EU law and therefore must apply the Directive. If this clashes with international obligations the court would presumably endeavour to find a fit by manipulating international provisions, so as to do achieve judicially what Article 351 TFEU ideally requires politically. But theoretical analysis reveals something of a repetitive cycle, comprising international law (presumably) incorporated into a domestic legal system, Supremacy of EU Law and the provision of Article 351 TFEU that it is not to affect ‘rights and obligations’ under international law.

Customary International Law at the European Level

Given the weak prospect of success in proceeding by reliance on Treaty law, it is notable that the question referred to the ECJ expressly asks about compliance with customary international law provisions also. Generally in international law where a state is not party to a Treaty it may nonetheless become bound by equivalent provisions where those provisions have separately crystallised into customary international law. The ECJ has been receptive of this when applicants have sought to rely on such provisions to review EU legislation. As noted above, this was clearly why any extraterritorial elements were sought to be downplayed greatly by environmental organisations when the referral of the question was made. In *Poulsen* the ECJ considered that fishing legislation should indeed be interpreted to give ‘the greatest practical effect’ of the aims of the EU legislation, but crucially that this would be conducted ‘within the limits of international law’.²⁷ The ECJ then proceeded

²⁶ Eeckhout (N 22 above), p337-8.

²⁷ *Poulsen* (N 15 above).

with this analysis and gave guidance on relevant points of the Regulation.²⁸ As noted above, *Intertanko* implies the ECJ is now reluctant to partake in such analysis and merely stated the principle in that case. Interpretation not being conducted, the remaining hope for the applicants in our case would be for the court to find the Directive unlawful due to a breach of general international law. But it has been noted that, even in the progressive case of *Poulsen*, the ECJ may not have anticipated ease of step from questions of interpretation to questions of unlawfulness,²⁹ and *Intertanko* appears only to render any such a step all the wider.

In *Intertanko* it was noted that the Marpol Convention had not codified any general international law.³⁰ UNCLOS clearly may contain many crystallised principles of general international law, however, the EU is party to that Convention and the focus of the Court then shifted to questioning the presence of direct effect. The outcome of the analysis being that:

UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State.³¹

This was so in spite of the fact that ‘wording of certain provisions of UNCLOS, such as Articles 17, 110(3) and 111(8), appears to attach rights to ships’³², and ‘the fact that Part XI of UNCLOS involves natural and legal persons in the exploration of the seabed’.³³ It appears then that an investigation into the ‘nature and the broad logic, as disclosed in particular by its aim, preamble and terms...’ affords much discretion for the Court to ultimately ‘preclude examination of the validity of Community measures in the light of its provisions’.³⁴

²⁸ Ibid paragraphs 16, 20 and 29.

²⁹ Eeckhout (N 22 above), p 326.

³⁰ *Intertanko* (N 13 above), paragraph 51.

³¹ Ibid, paragraph 64.

³² Ibid, paragraph 61.

³³ Ibid, paragraph 63.

³⁴ Ibid, paragraph 54.

This approach, and conclusion, has been questioned as a possible ‘watershed moment’³⁵; in that it may mark a departure from the previously more commonly held conception that one ‘certainly not conclude that that the EU legal order is hostile towards international law.’³⁶ But a broader incorporation of the WTO approach (presuming a lack of direct effect), which had been considered the exception,³⁷ raises some questions. The ultimate consequence is undoubtedly less immense pressure on the EU to respect the provisions of the UNCLOS or any other similar provisions be they binding or customary. This trend shall likely continue in *ATA v SoS*. For the reason that it would be something of an absurdity were the Court to welcome international provisions not binding on the EU but crystallising general rules, whilst simultaneously (as with UNCLOS in *Intertanko*) deploying direct effect hurdles to preclude application of a Treaty which crystallises such rules *and* forms an integral part of the EU legal system. The prospect of the Directive being declared invalid, or indeed even being interpreted, in light of international law consequently appears highly improbable.

3. Comment.

Reasonableness

The EU arguably gathers much traction politically through the reasonableness of its legislation rather than the strength of its legal position. For it is immediately noticeable that the parties that shall suffer most financial hardship under the provisions will be EU carriers; as their flights shall always depart from or arrive at an EU aerodrome. It has also been noted that conversely governments in the Gulf are increasingly supportive of their domestic carriers, and that EU airlines are concerned by this factor, particularly when coupled with the prospective effects of Directive

³⁵ M Mendez, *The legal effect of Community agreements: maximalist treaty enforcement and judicial avoidance techniques*, E.J.I.L. 2010, 21(1), (83), p 103.

³⁶ Eeckhout (N 22 above) p343.

³⁷ Ibid p342-345.

2008/101.³⁸ Furthermore, commentators have stated that even where long-haul flights of non-EU origin are covered by the scheme the superior efficiencies of larger aircraft shall mitigate expense. This means that the spoke part of a “hub-and-spoke” operation is far more fuel efficient than the shorter flights to the hub. That an EU airlines’ hub operation is included in addition to its long-haul counterpart is thus not merely a disadvantage, but an exponential one. To complete EU business complaints, concern has been expressed that even EU airports could lose traffic; as US carriers may use airports in the Gulf to link flights to the large Asia market in order to avoid charges on even their efficient long-haul flights.³⁹ The selflessness of the provisions are unquestionable; nobody shall be more hurt than the EU (businesses).

The Standard Internal Approach

The ECJ adopts a teleological approach in its internal judgements and this inevitably allows the court discretion in interpretation. The above analysis displays conversely that in questioning direct effect of international Treaties and general law there are many technical issues which appear. Once these have been overcome the applicant is, in principle, entitled to have the legislation which contradicts with the international provision declared void or, at least, reinterpreted. The case at hand deals with environmental protection on an incredible scale. Directive 2008/101 shall form part of the EU’s greatly developed environmental policy in which emissions trading has been termed by the European Parliament as ‘the cornerstone’.⁴⁰ Environmental legislation has been passed at an increasing rate, and the EU is now into its sixth Environmental Action Programme.⁴¹ The exponential growth of environmental issues, which now must be incorporated in every EU measure by virtue of Article 11 TFEU, owes much to the ECJ itself.

³⁸ Briefing: *Aviation in the Gulf, Rulers of the new silk road*, The Economist 5/6/2010.

³⁹ U Steppeler and A Klingmuller, *EU emissions trading scheme and aviation: quo vadis?* A. & S.L. 2009, (253) p256-7.

⁴⁰ S Truxal, *At the Sidelines of Implementing the EU ETS: objections to “validity”*, Int. T.L.R. (111), p118.

⁴¹ Communication on the Sixth Environment Action Programme of the European Community, "Environment 2010: Our future, Our choice" <http://europa.eu/legislation_summaries/environment/general_provisions/l28027_en.htm>.

The court has proved willing to uphold measures to protect the environment, even to the detriment of Free Movement provisions.⁴² These “Four Fundamental Freedoms” are at the very core of the EU and have historically been fiercely protected by the ECJ. Distinctly applicable measures adopted by Member States discriminate on grounds of nationality and, as such, strike at the very notions of an internal market. As such they can only be saved through recourse the narrow Article 36 TFEU derogations.⁴³ *PrussenElektra*⁴⁴, however, may prove that environmental protection can also be invoked to justify a discriminatory measure. The provision required purchasers of electricity to acquire a certain amount from renewable sources. The court did not determine whether the measure was distinctly or indistinctly applicable although it appeared to be the former. The court, stated, somewhat unconvincingly ‘that that [State] policy is also designed to protect the health and life of humans, animals and plants’,⁴⁵ grounds which are contained in Article 36. It went on to note that the internal market for electricity was not yet fully liberalised. And furthermore, that it is difficult to determine the origin of electricity once within a distribution system ‘and the source of energy from which it was produced’,⁴⁶ and finally that a certification system was required at EU level before such trading would be practicable.⁴⁷ The final statement undermines much of the case law relating to mutual recognition. In the *Foie Gras* case⁴⁸ it was emphasised that trust between Member States as to domestic regulation was paramount, and that as such only foie gras ‘so different in content as to give rise to suspicion of deceit’⁴⁹ would entitle protective State measures to be taken. In *PrussenElektra* the ECJ clearly sought to encourage and promote renewable energy and environmental concern. As such Treaty provisions appeared to be somewhat manipulated, and the applied test of proportionality was a weak one. Jacobs AG questioned whether the court should go further and expressly acknowledge that environmental protection was now an Article 36 derogation.⁵⁰ The ability of the court to arrive at what it felt to be the correct conclusion, in spite of

⁴² E.g. Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* [1997].

⁴³ Including; Public morality, public policy or security; the protection of human health and life of humans, animals or plants.

⁴⁴ Case C-379/98 *PreussenElektra AG v Schleswig AG* [2001].

⁴⁵ Ibid paragraph 75.

⁴⁶ Ibid paragraph 79.

⁴⁷ Ibid paragraph 80.

⁴⁸ Case C-184/96. *Commission v French Republic* [1998].

⁴⁹ Ibid paragraph 25.

⁵⁰ M Horspool and M Humphreys, *European Union Law*, (4th edn, OUP, 2006) at page 337.

Treaty provisions and a legacy of case law suggesting differently, marks both the ECJ's commitment to environmental issues and its willingness find a means of acting to protect legislation it feels holds value. There is an internal balance, and Article 3(5) TEU could provide the external balance. This would benefit all - including advocates of international law - for at current international law is avoided due to its potential to overwhelm. Few things in life are ever perfect; compromise is needed and this is the "Case" to begin.